IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 496 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE B.J.SHETHNA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

VALLABHBHAI PRAHLADBHAI PATEL

Versus

DENA BANK

Appearance:

1. Appeal from Order No. 496 of 1998

MS SD RAMI for Petitioner No. 1

MR MA PAREKH for Respondent No. 1

CORAM : MR.JUSTICE B.J.SHETHNA

Date of decision: 25/10/2001

ORAL JUDGEMENT

The appellant has challenged in this appeal the impugned order dated 11.9.1998 passed by the learned Judge, City Civil Court, Ahmedabad, Court No.24 rejecting

the Civil Misc. Application No.333 of 1997 filed by the appellant-applicant for setting aside the ex-parte decree passed in Regular Civil Suit No.5745/93.

Respondent-Dena Bank filed Regular Civil Suit No.5745/93 before the trial court against M/s.Priya Rubber Moulders and its proprietor Mr.Narendra Ramanlal Patel and their guarantors Shri Keshabhai Chhanabhai and present appellant-Vallabhbhai Prahladbhai Patel. Though served all of them remained absent and not appeared either personally or through their advocate, therefore, ex-parte decree was passed by the learned Trial Judge against all the respondents on 23.8.1996.

The respondent-Bank wanted to execute decree only against the present appellant, therefore, present appellant-applicant approached the trial court by way of Civil Misc. Application No.333/97 for setting aside ex-parte decree passed by the trial court on the ground that original defendant Nos.1 and 2 have cheated him and falsely obtained his signature on vakalatnama. It was stated in the application that he was served with the summons of the suit on 25.8.1994. On contacting the other defendant of the suit he was assured by them that the amount shall be paid by disposing of their machinery and for the remaining amount installments would be asked for and he would be absolved from the respondent No.1 to pay the amount of claim of the bank in the suit. He was also assured that they are going to engage the advocate for the defendant and thereby they obtained signature on vakalatnama. But thereafter they have not made any efforts to defend the suit. It was also stated in the application that on 5.4.1997 when the officers of the respondent-Bank came with the bailiff to his house for execution of `Jangam' warrant issued in Execution Petition on the strength of the decree passed in the above suit then he contacted the principal debtor who had shown his inability to pay the decretal amount and he was given evasive reply regarding not engaging the advocate to defend them in the suit. On these grounds, it was submitted that the ex-parte decree be set aside against him.

However, learned Trial Judge by his impugned order dated 11.9.1998 held that the aforesaid grounds were not sufficient and on such flimsy grounds the suit cannot be restored and the ex-parte decree cannot be set aside.

Learned counsel Ms.Sushila Rami vehemently submitted that the learned Trial Judge has committed

grave error in rejecting the application filed by the applicant for setting aside the ex-parte decree passed by him in the Regular Civil Suit No.5745/93. She submitted that the appellant-applicant was cheated by the firm and its proprietor from contesting the suit with the false assurance that they will sold of their machinery and for the remaining amount installments be asked for by engaging their advocates to defend them in the suit. She submitted that this version of the applicant has been duly corroborated by the evidence of Shri Anil Hansraj Thakkar, who introduced Proprietor of M/s.Priya Rubber Moulders, Mr.Narendra Patel to the present appellant, but the said affidavit was not at all considered by the learned trial Judge in his impugned order. She further submitted that out of the principal amount of Rs.2,00,000/= the applicant-appellant has deposited Rs.1,25,000/= before the trial court which was deposited at the time of hearing of Civil Misc. Application No.333/97. Not only that at the time of execution of `Jangam' warrant the appellant paid Rs.20,000/= to the respondent-Bank. She, therefore, submitted that the appellant should be given a fair chance to contest the suit more particularly the respondent-Bank is not interested in proceeding further with the defendant firm-original debtor as the bank is not taking any action for the recovery of the said amount from the sale of the goods which were hypothecated today by the defendant firm.

At the time of hearing of this appeal, learned counsel Shri Parekh for the respondent-Bank was not present. However, it is clear from the reply affidavit filed by the respondent-Bank in Civil Application No.9593/98 that the appellant had deposited Rs.1,25,000/= and further amount of Rs.20,000/= at the time of execution of `Jangam' warrant out of principle amount of Rs.2,00,000/=. Taking into consideration this fact and that the learned Trial Judge has not at all dealt with the affidavit of Shri Anil Hansraj Thakkar filed in support of applicant the impugned order passed by the learned Trial Judge is required to be set aside because of peculiar facts and circumstances of this case it is clear that the applicant-defendant was reasonably denied from defending himself in the Regular Civil Suit No.5745/93 filed by the respondent-bank against the defendant-firm, its proprietor and two other guarantors including the present applicant. His bonafide cannot be doubted when immediately he paid Rs.20,000/= at the time of execution of `Jangam' warrant and deposited Rs.1,25,000/= as directed by the Trial Court at the time of hearing of Civil Misc. Application No.333 of 1997.

In view of the above discussion, this appeal is allowed. The impugned order dated 11.9.1998 passed by the learned City Civil Judge, Court No.24, Ahmedabad dismissing the Civil Misc. Application No.333 of 1997 refusing to set aside the ex-parte decree passed in Regular Civil Suit No.5745/93 is hereby quashed and set aside and the Civil Misc. Application No.333 of 1997 filed before the trial court stands allowed and the ex-parte decree passed qua the present appellant-applicant-Vallabhbhai Prahladbhai Patel in Regular Civil Suit No.5746/93 is hereby quashed and set aside. Learned Trial Court may now proceed against the present applicant in Regular Civil Suit No.5746/93 filed by respondent-Bank and decide the same strictly in accordance with law. Till then, the amount of Rs.1,25,000/= deposited by the appellant-applicant before the trial court in Civil Misc. Application No.333 of 1997 shall remain with the trial court which may be invested in a nationalised bank for a period of 5 years. In case, if the appellant succeeds then he will get back that amount with the interest accrued on it. In case, if he fails then, the said amount along with amount of Rs.20,000/= already paid by him at the time of execution of `Jangam' warrant shall be appropriated at the time of passing the decree against the present appellant by the learned Trial Court. Civil Application is disposed of in terms of order passed in Appeal from Order.

(B.J.Shethna, J.)

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